

JUNK FAX PREVENTION ACT OF 2004

JULY 9, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BARTON of Texas, from the Committee on Energy and Commerce, submitted the following

R E P O R T

[To accompany H.R. 4600]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 4600) to amend section 227 of the Communications Act of 1934 to clarify the prohibition on junk fax transmissions, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Junk Fax Prevention Act of 2004”.

SEC. 2. PROHIBITION ON FAX TRANSMISSIONS CONTAINING UNSOLICITED ADVERTISEMENTS.

(a) **PROHIBITION.**—Subparagraph (C) of section 227(b)(1) of the Communications Act of 1934 (47 U.S.C. 227(b)(1)(C)) is amended to read as follows:

“(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

“(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient, and

“(ii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or”.

(b) **DEFINITION OF ESTABLISHED BUSINESS RELATIONSHIP.**—Subsection (a) of section 227 of the Communications Act of 1934 (47 U.S.C. 227(a)) is amended—

(1) by redesignating paragraphs (2) through (4) as paragraphs (3) through (5), respectively; and

(2) by inserting after paragraph (1) the following new paragraph:

“(2) The term ‘established business relationship’, for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of the Commission’s regulations, as in effect on January 1, 2003, except that—

“(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

“(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G).”.

(c) **REQUIRED NOTICE OF OPT-OUT OPPORTUNITY.**—Paragraph (2) of section 227(b) of the Communications Act of 1934 (47 U.S.C. 227(b)(2)) is amended—

(1) in subparagraph (B), by striking “and” at the end;

(2) in subparagraph (C), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following new subparagraph:

“(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

“(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

“(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

“(iii) the notice sets forth the requirements for a request under subparagraph (E);

“(iv) the notice includes—

“(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

“(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

“(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request during regular business hours; and

“(vi) the notice complies with the requirements of subsection (d);”.

(d) **REQUEST TO OPT-OUT OF FUTURE UNSOLICITED ADVERTISEMENTS.**—Paragraph (2) of section 227(b) of the Communications Act of 1934 (47 U.S.C. 227(b)(2)), as

amended by subsection (c) of this section, is further amended by adding at the end the following new subparagraph:

“(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

“(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

“(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

“(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;”.

(e) **AUTHORITY TO ESTABLISH NONPROFIT EXCEPTION.**—Paragraph (2) of section 227(b) of the Communications Act of 1934 (47 U.S.C. 227(b)(2)), as amended by subsections (c) and (d) of this section, is further amended by adding at the end the following new subparagraph:

“(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association’s tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(ii), except that the Commission may take action under this subparagraph only by regulation issued after public notice and opportunity for public comment and only if the Commission determines that such notice required by paragraph (1)(C)(ii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and”.

(f) **AUTHORITY TO ESTABLISH TIME LIMIT ON ESTABLISHED BUSINESS RELATIONSHIP EXCEPTION.**—Paragraph (2) of section 227(b) of the Communications Act of 1934 (47 U.S.C. 227(b)(2)), as amended by subsections (c), (d), and (e) of this section, is further amended by adding at the end the following new subparagraph:

“(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship to a period not shorter than 5 years and not longer than 7 years after the last occurrence of an action sufficient to establish such a relationship, but only if—

“(I) the Commission determines that the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

“(II) upon review of such complaints referred to in subclause (I), the Commission has reason to believe that a significant number of such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

“(III) the Commission determines that the costs to senders of demonstrating the existence of an established business relationship within a specified period of time do not outweigh the benefits to recipients of establishing a limitation on such established business relationship; and

“(IV) the Commission determines that, with respect to small businesses, the costs are not unduly burdensome, given the revenues generated by small businesses, and taking into account the number of specific complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines by small businesses; and

“(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-year period that begins on the date of the enactment of the Junk Fax Prevention Act of 2004.”.

(g) **UNSOLICITED ADVERTISEMENT.**—Paragraph (5) of section 227(a) of the Communications Act of 1934 (47 U.S.C. 227(a)(4)), as so redesignated by subsection (b)(1) of this section, is amended by inserting “, in writing or otherwise” before the period at the end.

(h) REGULATIONS.—Except as provided in clause (ii) of section 227(b)(2)(G) of the Communications Act of 1934 (as added by subsection (f) of this section), not later than 270 days after the date of the enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section.

SEC. 3. FCC ANNUAL REPORT REGARDING JUNK FAX ENFORCEMENT.

Section 227 of the Communications Act of 1934 (47 U.S.C. 227) is amended by adding at the end the following new subsection:

“(g) JUNK FAX ENFORCEMENT REPORT.—The Commission shall submit a report to the Congress for each year regarding the enforcement of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which shall include the following information:

“(1) The number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission’s rules.

“(2) The number of such complaints received during the year on which the Commission has taken action.

“(3) The number of such complaints that remain pending at the end of the year.

“(4) The number of citations issued by the Commission pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.

“(5) The number of notices of apparent liability issued by the Commission pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.

“(6) For each such notice—

“(A) the amount of the proposed forfeiture penalty involved;

“(B) the person to whom the notice was issued;

“(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

“(D) the status of the proceeding.

“(7) The number of final orders imposing forfeiture penalties issued pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.

“(8) For each such forfeiture order—

“(A) the amount of the penalty imposed by the order;

“(B) the person to whom the order was issued;

“(C) whether the forfeiture penalty has been paid; and

“(D) the amount paid.

“(9) For each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty.

“(10) For each case in which the Commission referred such an order for recovery—

“(A) the number of days from the date the Commission issued such order to the date of such referral;

“(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

“(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.”.

SEC. 4. GAO STUDY OF JUNK FAX ENFORCEMENT.

(a) IN GENERAL.—The Comptroller General of the United States shall conduct a study regarding complaints received by the Federal Communications Commission concerning unsolicited advertisements sent to telephone facsimile machines, which shall determine—

(1) the mechanisms established by the Commission to receive, investigate, and respond to such complaints;

(2) the level of enforcement success achieved by the Commission regarding such complaints;

(3) whether complainants to the Commission are adequately informed by the Commission of the responses to their complaints; and

(4) whether additional enforcement measures are necessary to protect consumers, including recommendations regarding such additional enforcement measures.

(b) **ADDITIONAL ENFORCEMENT REMEDIES.**—In conducting the analysis and making the recommendations required under paragraph (7) of subsection (a), the Comptroller General shall specifically examine—

- (1) the adequacy of existing statutory enforcement actions available to the Commission;
- (2) the adequacy of existing statutory enforcement actions and remedies available to consumers;
- (3) the impact of existing statutory enforcement remedies on senders of facsimiles;
- (4) whether increasing the amount of financial penalties is warranted to achieve greater deterrent effect; and
- (5) whether establishing penalties and enforcement actions for repeat violators or abusive violations similar to those established by section 4 of the CAN-SPAM Act of 2003 (15 U.S.C. 7703) would have a greater deterrent effect.

(c) **REPORT.**—Not later than 270 days after the date of the enactment of this Act, the Comptroller General shall submit a report on the results of the study under this section to Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

PURPOSE AND SUMMARY

H.R. 4600, the “Junk Fax Prevention Act of 2004,” reestablishes an “established business relationship” exception to allow entities to send commercial faxes to their customers and members without first receiving written permission, and establishes new opt-out safeguards to provide additional protections for fax recipients.

BACKGROUND AND NEED FOR LEGISLATION

As part of the Telecommunications Consumer Protection Act (TCPA), passed in 1991, along with the more well-known “Do-Not-Call” provisions, Congress also included language regulating unsolicited commercial faxes. (P.L. 102-243; 47 U.S.C. 227) The law prohibited anyone from faxing an “unsolicited advertisement,” which is defined as “material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. 227(a)(4).

In creating the rules to implement the TCPA junk fax prohibition, the Federal Communications Commission (Commission) stated that “the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition.” 1992 TCPA Order, 7 FCC Rcd 2736 at 8779, para. 54, n. 87. It noted, however, that facsimile transmissions from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. *Ibid.* For over ten years, the Commission enforced the TCPA junk fax provisions under this interpretation.

In 2003, the FCC revisited the TCPA and amended its junk fax rules. After reviewing the record and the underlying statute, the Commission reversed its longstanding interpretation of how a sender could satisfy the TCPA’s requirement for “prior express invitation or permission” before transmitting an unsolicited fax advertisement. The Commission concluded that the “express invitation or permission” required the consent be in writing and must include the recipient’s signature. 2003 TCPA Report and Order, FCC 03-153, p. 111 (June 26, 2003). The Commission reached this conclusion by noting that although the TCPA provided a specific statutory exemption for an established business relationship for the “do not call” provisions, there was no such similar language relating to

junk faxes. In fact, Congress initially included such an exemption in the TCPA for junk faxes, but removed it from the final version of the statute.

In practice, the revised “prior express invitation or permission” requirement would have significant consequences. For instance, if one were to call a restaurant and request a faxed menu, the restaurant could not send such a fax without first obtaining written permission. A potential purchaser requesting information from a realtor on a home sale would have to wait to receive that information from the realtor until he or she provided a signed written permission slip to the realtor. The cost and effort of compliance could devastate the profits of some businesses, particularly those small businesses that rely heavily on the efficiency and effectiveness of fax machines.

Following the release of the amended TCPA rules, there was a flurry of petitions for reconsideration filed with the Commission requesting that the Commission maintain its earlier interpretation of the junk fax rules. Businesses, associations, and other organizations argued that to require written permission to fax every customer or client was overly burdensome, expensive and unnecessary. In particular, organizations such as trade associations and other non-profits, that have hundreds of thousands of members, would be charged with a huge burden to collect signatures from each member just to send an unsolicited fax. For instance, the National Association of Wholesaler-Distributors claimed that its member companies expected to pay an average of \$22,500 to obtain consent forms and an average of \$20,000 for annual compliance. The National Association of Realtors estimated that it would have to collect over 67 million permissions to sustain the roughly 6 million home sales from last year. Other economic impacts included the costs of training, making multiple contracts to obtain signatures providing consent, and obtaining permission for each fax machine when the recipients change location. On August 25, 2003, the Commission stayed the implementation of its revised TCPA junk fax rules for 16 months. The revised rules are currently set to go into effect January 2005.

In light of the fact that the Commission has indicated it may not reverse its new rule removing the established business relationship exception from the general ban on sending unsolicited facsimile advertisements, it became apparent that a legislative remedy was required. H.R. 4600, the “Junk Fax Prevention Act of 2004” specifically provides an exception from the general prohibition on sending unsolicited advertisements if the fax is sent based on an established business relationship and certain conditions are met. This legislation is designed to permit legitimate businesses to do business without the unnecessary and expensive burden of collecting written permission to send faxes. In reinstating the established business relationship, the Committee determined it was necessary to provide recipients with the ability to stop future unwanted faxes sent pursuant to such relationship. As such, the Committee also added the strong consumer protection measure of requiring every unsolicited facsimile advertisement to contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations.

HEARINGS

The Subcommittee on Telecommunications and the Internet held a hearing on “H.R. _____, “The Junk Fax Prevention Act of 2004” on June 15, 2004. The Subcommittee received testimony from: Mr. K. Dane Snowden, Chief, Consumer & Governmental Affairs Bureau, Federal Communications Commission; Mr. Walt McDonald, President, National Association of Realtors; Mr. John H. Graham IV, President and Chief Executive Officer, American Society of Association Executives; and Ms. Cheryl Kaechele, Publisher, Allegan County News, on behalf of the National Newspaper Association.

COMMITTEE CONSIDERATION

On Thursday, June 24, 2004, the Full Committee met in open markup session and ordered H.R. 4600 reported, as amended, by a voice vote, a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 4600 reported. A motion by Mr. Pickering to order H.R. 4600 reported to the House, as amended, was agreed to by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of H.R. 4600 is to maintain the general prohibition on faxing unsolicited advertisements while allowing a reasonable exception for faxing unsolicited advertisements to persons based upon an established business relationship, and creating the ability of such persons to opt-out of future unsolicited advertisements.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 4600, the Junk Fax Prevention Act of 2004, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by

the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 7, 2004.

Hon. JOE BARTON,
*Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4600, the Junk Fax Prevention Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Melissa E. Zimmerman.

Sincerely,

ELIZABETH ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 4600—Junk Fax Prevention Act of 2004

H.R. 4600 would amend current law and regulations relating to unsolicited advertisements sent via telephone facsimile machine. The bill would direct the Federal Communications Commission (FCC) to issue regulations to control unsolicited advertisement sent via telephone facsimile machine. It would require the FCC and the General Accounting Office to issue reports to the Congress on the effectiveness of these regulations. The FCC currently enforces laws relating to unsolicited advertisements, including assessing and collecting civil penalties for violations of such laws. (Civil penalties are recorded in the federal budget as revenues.) Based on information from the FCC, CBO estimates that implementing H.R. 4600 would not have a significant effect on revenues or spending subject to appropriation. Enacting the bill would not affect direct spending.

H.R. 4600 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

H.R. 4600 would impose private-sector mandates, as defined in the UMRA, on senders of unsolicited facsimile advertisements. The bill would require senders to include an opt-out notice that is clear, conspicuous, and on the first page. Such a notice would allow recipients to contact the sender to prevent them from sending unsolicited advertisements in the future. Additionally, the opt-out notice must include “a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and a cost-free mechanism for a recipient to transmit a request.” The cost-free mechanism might include either a toll-free or a local telephone number.

Regulations passed by the Federal Communications Commission in July 2003 that are slated to take effect in January 2005 would require written permission from recipients prior to senders’ transmission of any unsolicited fax advertisements. If this bill were enacted, it would eliminate the requirement to obtain written permission from customers but replace this requirement with the opt-out mechanism. Based on information from industry sources, CBO expects that the aggregate direct cost of mandates in the bill would

be fully offset by savings from the bill and thus would fall below the annual threshold established by UMRA for private-sector mandates (\$120 million in 2004, adjusted annually for inflation).

The CBO staff contacts for this estimate are Melissa E. Zimmerman (for federal costs), Sarah Puro (for the state and local impact), and Karen Raupp (for the private-sector impact). The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 establishes the short title as the “Junk Fax Prevention Act of 2004.”

Section 2. Prohibition on fax transmissions containing unsolicited advertisements.

Section 2(a) amends section 227(b)(1)(C) of the Communications Act of 1934 by creating an exception to the general prohibition against sending unsolicited commercial advertisements to fax machines. This provision essentially mirrors previous Commission rules permitting unsolicited commercial advertisements to be sent to recipients if the fax is sent based on an “established business relationship.” This section also includes a new requirement that such faxes be sent with an opt-out notice. In the event a recipient opts out of receiving future unsolicited advertisements, it is unlawful for a sender to fax any additional unsolicited advertisements to such recipients.

In order for the TCPA to apply, the fax must be an “unsolicited advertisement” which requires a communication be “advertising the commercial availability or quality of any property, goods or services * * *.” Faxes that are merely transactional, or that fail to

contain an advertisement for a commercial product or service, do not meet this definition and are therefore not subject to the restrictions of the TCPA. By transactional faxes, the Committee refers to faxes similar in nature to a “transactional or relationship message” defined under paragraph 17, Section 3 of P.L. 108–187, the CAN-SPAM Act of 2003. Additionally, H.R. 4600 does not alter the treatment of faxes sent by charitable organizations in furtherance of its tax-exempt purpose, which, under most situations, are not considered “unsolicited advertisements” under the TCPA.

Section 2(b) defines the term “established business relationship” by incorporating the definition of “established business relationship” in 47 C.F.R. 64.1200 as those regulations were in effect as of January 1, 2003, except that the definition now applies to both residential and commercial entities. Additionally, section 2(b) allows the Commission to limit the duration of the established business relationship pursuant to section 2(f).

Section 2(c) adds a new subparagraph (D) to section 227(b)(2) of the Communications Act of 1934 by setting forth the necessary elements of an opt-out notice. The opt-out notice must be clear and conspicuous and on the first page of the unsolicited advertisement. The Committee used the phrase “first page of the unsolicited advertisement” as opposed to the “first page of the facsimile” to ensure that senders of unsolicited fax advertisements inadvertently would not be liable if such faxes were sent and the clear and conspicuous notice was not on the first page received by the recipient because pages were faxed or received in the wrong order. An opt-out notice will comply with this section if the opt-out notice clearly and conspicuously appears on the first page of a fax, such as a fax cover page, or on the first page of the underlying unsolicited advertisement.

The opt-out notice must inform the recipient of his or her ability to opt-out of future unsolicited advertisements to any fax machine or machines, and that request must be complied with in the shortest reasonable time. The notice must include a domestic telephone and facsimile number that will receive an opt-out request, and a cost-free mechanism for the recipient to send such a request to the sender. For businesses that focus on local commerce, the cost-free requirement should not pose any undue financial burden. However, for those businesses that have interstate business relationships, the requirement of providing a cost-free mechanism to opt-out of future faxes could be an expensive proposition. This provision should not be interpreted as a mandate for such businesses to establish a toll-free number to receive opt-out requests. Businesses should be allowed to exercise some flexibility and creativity in providing cost-free options, such as e-mail, walk-ins, etc. In order to minimize the possible financial consequences of this provision, section 2(c) gives the Commission the authority to, by rule, exempt certain classes of small business senders from the requirement to provide the additional cost-free mechanism if the Commission determines that the costs to those businesses is unduly burdensome given the revenues generated by that class of small business.

Section 2(c) also requires that the telephone and facsimile machine numbers and the cost-free mechanism provided to a recipient must permit an individual or business to make an opt-out request during regular business hours. Finally, the opt-out notice must

comply with the current provisions of section 227(d), which require that any fax being sent contain in the margins at the top or bottom of each page the date and time it is sent, the identification of the sender of the message, and the telephone number of the sending machine.

Section 2(d) adds a new subparagraph (E) to section 227(b)(1) of the Communications Act of 1934 by setting forth what a recipient must do to opt-out of future unsolicited advertisements. The Commission, by rule, shall provide that an opt-out request is valid if it (1) identifies the telephone number or numbers of the fax machine or machines subject to the request; (2) is made to the telephone or fax number of the sender that is provided under subparagraph (D)(iv), or by any other method as determined by the Commission; and (3) is made by a person who has not subsequently provided express invitation or permission to receive unsolicited advertisements. Although the “established business relationship” has been defined on the basis of a commercial transaction or inquiry, with or without the exchange of consideration, the Commission should take precautions to ensure that even if a recipient opts out of receiving unsolicited facsimile advertisements, that any subsequent purchases or inquiries do not create or renew the “established business relationship” exemption without some affirmative opt-in by the recipient.

Section 2(e) adds a new subparagraph (F) to 227(b)(1) of the Communications Act of 1934 by giving the Commission the authority to establish an exemption from the opt-out notice requirements for tax-exempt, nonprofit trade or professional associations if those faxes are in furtherance of the group’s tax-exempt purpose. Section 2(e) is designed to apply to certain entities classified under the Internal Revenue Service’s definition of section 501(c)(6) organizations, which include such groups as business leagues, chambers of commerce, real estate boards, and boards of trade which are not organized for profit and no part of the net earnings inures to the benefit of any private shareholder or individual. This section is not designed to apply to charities. This provision is discretionary, and the Commission may create a rule only if the Commission finds that such opt-out notices are not necessary to protect the ability of association members to stop future unsolicited facsimile advertisements sent by the association. The Committee provided the Commission with this authority because members of tax-exempt, nonprofit trade and professional associations have chosen to affirmatively join a particular organization, which typically requires the payment of annual dues. Arguably, these members may have an expectation of communications, including faxes, as part of their membership and have a greater degree of control in effectuating their preferences with respect to how their association communicates with them.

Although under section 2(e), the Commission may decide to exempt tax-exempt, nonprofit trade and professional associations from the opt-out notice requirements, nothing in H.R. 4600 is designed to exempt these organizations from the requirement to honor a request to opt-out of future unsolicited facsimile advertisements from their members.

Section 2(f) adds a new subparagraph (G)(i) to section 227(b)(2) of the Communications Act of 1934 by giving the Commission the authority to establish a time limit on the “established business re-

lationship” exemption. Under the TCPA junk fax rules as interpreted prior to January 1, 2003, there was no specific time limit on the length of the established business relationship. During the hearing in the Subcommittee on Telecommunications and the Internet, there was testimony by the Commission suggesting that it receives approximately 1,500 junk fax complaints monthly. The Commission, however, was unable to tell the Committee whether those complaints arose from faxes sent under an established business relationship, or whether those complaints arose from faxes that are already illegal under the general ban on junk faxes.

The Committee is mindful that the financial and administrative costs incurred by senders to implement a specific time limit on the established business relationship could be burdensome. On the other hand, the costs of not implementing a specific time limit could also harm fax recipients. In the event the ability to opt-out does not remedy the complaints relating to faxes sent under an established business relationship, the Committee has given the Commission the authority to create such a specific time limit. Three years after enactment of H.R. 4600, the Commission may by rule create a time limit for the established business relationship exemption for junk faxes that may be no less than 5 years and no more than 7 years. The Commission may only create a rule if it (1) determines that the existence of the established business relationship exception has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines; (2) upon review of such complaints, the Commission has reason to believe that a significant number of such complaints involve unsolicited advertisements that were sent based on an established business relationship that was longer than the Commission believes is consistent with the reasonable expectations of consumers; (3) the Commission determines that the costs to senders of demonstrating the existence of an established business relationship within a specified period of time do not outweigh the benefits to recipients of establishing a limitation on the established business relationship; and (4) the Commission determines that for small businesses, the costs are not unduly burdensome given the revenues generated by small businesses and taking into consideration the number of specific complaints to the Commission involving faxes sent by small businesses.

Section 2(g) amends section 227(a)(4) of the Communications Act of 1934 by clarifying that “express invitation or permission” may be secured in writing or otherwise, as determined by the Commission.

Section 2(h) requires the Commission to issue its regulations no later than 270 days after enactment of this Act.

Section 3. FCC annual report regarding junk fax enforcement

Section 3 adds a new section (g) to section 227 of the Communications Act of 1934 that requires the Commission to report annually to the Congress on the enforcement of the junk fax provisions of the TCPA. Specifically, the report must include the following: (1) the number of complaints received by the Commission annually alleging a violation of the general ban on sending unsolicited advertisements; (2) the number of such complaints received during the year on which the Commission has taken action; (3) the number of such complaints that remain pending at the end of the year; (4) the

number of citations issued for sending unsolicited advertisements; (5) the number of notices of apparent liability issued for sending unsolicited advertisements; (6) for each such notice (a) the amount of the proposed forfeiture; (b) the person to whom the notice was issued; (c) the length of time between the date on which the complaint was filed and the date the notice was issued; (d) the status of the proceeding; (7) the number of final orders imposing forfeiture penalties for sending unsolicited advertisements; (8) for each such forfeiture order (a) the amount of the penalty; (b) the person to whom the order was issued; (c) whether the penalty was paid; and (d) the amount paid; and (9) for each case that was referred for recovery (a) the number of days from the date the Commission issues such order to the date of referral; (b) whether an action has been commenced to recover the penalty; and (c) whether the recovery action resulted in any amount collected.

Section 4. GAO study on junk fax enforcement

Section 4(a) requires the Comptroller General of the United States (GAO) to conduct a study regarding complaints received by the Commission dealing with unsolicited advertisements that shall determine the following: (1) the mechanisms established by the Commission to receive, investigate and respond to such complaints; (2) the level of enforcement success by the Commission; (3) whether complainants are adequately informed by the Commission regarding their complaints; (4) whether additional enforcement measures are necessary to protect consumers, including recommendations for additional enforcement measures.

Section 4(b) requires the Comptroller General to specifically examine (1) the adequacy of existing statutory enforcement actions available to the Commission; (2) the adequacy of existing statutory enforcement actions and remedies available to consumers; (3) the impact of existing statutory enforcement remedies on senders of facsimiles; (4) whether increasing the amount of financial penalties is warranted to achieve greater deterrent effect; and (5) whether establishing penalties and enforcement actions for repeat violators similar to those established in section 4 of the CAN-SPAM Act of 2003 (15 U.S.C. 7703) would have a greater deterrent effect.

Section 4(c) states that the Comptroller General shall submit a report to Congress no later than 270 days after enactment of this Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

SECTION 227 OF THE COMMUNICATIONS ACT OF 1934

SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

(a) **DEFINITIONS.**—As used in this section—

(1) * * *

(2) *The term “established business relationship”, for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the*

term in section 64.1200 of the Commission's regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G).

[(2)] (3) The term “telephone facsimile machine” means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

[(3)] (4) The term “telephone solicitation” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

[(4)] (5) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, *in writing or otherwise.*

(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.—

(1) PROHIBITIONS.—It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) * * *

* * * * *

[(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or]

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient, and

(ii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

* * * * *

(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS.—The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) * * *

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) * * *

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) * * *

(II) do not include the transmission of any unsolicited advertisement; **[and]**

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect~~[[.]].~~;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request during regular business hours; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(ii), except that the Commission may take action under this subparagraph only by regulation issued after public notice and opportunity for public comment and only if the Commission determines that such notice required by paragraph (1)(C)(ii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship to a period not shorter than 5 years and not longer than 7 years after the last occurrence of an action sufficient to establish such a relationship, but only if—

(I) the Commission determines that the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) upon review of such complaints referred to in subclause (I), the Commission has reason to believe that a significant number of such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) the Commission determines that the costs to senders of demonstrating the existence of an established business relationship within a specified pe-

riod of time do not outweigh the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) the Commission determines that, with respect to small businesses, the costs are not unduly burdensome, given the revenues generated by small businesses, and taking into account the number of specific complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines by small businesses; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-year period that begins on the date of the enactment of the Junk Fax Prevention Act of 2004.

* * * * *

(g) *JUNK FAX ENFORCEMENT REPORT.*—The Commission shall submit a report to the Congress for each year regarding the enforcement of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which shall include the following information:

(1) The number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules.

(2) The number of such complaints received during the year on which the Commission has taken action.

(3) The number of such complaints that remain pending at the end of the year.

(4) The number of citations issued by the Commission pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.

(5) The number of notices of apparent liability issued by the Commission pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.

(6) For each such notice—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding.

(7) The number of final orders imposing forfeiture penalties issued pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.

(8) For each such forfeiture order—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid.

(9) *For each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty.*

(10) *For each case in which the Commission referred such an order for recovery—*

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

